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UNITED STATES DEPARTMENT OF JUSTICE

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Assistant Attorney General Donald F. Turner

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United States v. Laub Baking Co., et al. (Cr. 67-415; April 4, 1968; D. J. 60-70-65)

On January 12, 1968, all defendants (five baking companies and three individuals) entered pleas of not guilty to an indictment returned on November 14, 1967, charging price fixing and bid rigging on the sale of bakery products in Northern Ohio.

The three individual defendants moved for protective order relieving the individuals from being photographed and fingerprinted by the United States Marshal. Defendants argued: (1) the United States Marshal has no authority to fingerprint any person charged with a federal misdemeanor in Ohio; (2) to fingerprint these individuals would violate their constitutional right against self-incrimination; (3) fingerprinting these defendants would constitute an unreasonable search and seizure, and (4) fingerprinting these defendants would invade their constitutionally protected right of privacy.

Judge Lambros treated each point as follows:

(1) Authority to Fingerprint

The defendants relied upon 28 U. S. C. 570 in arguing that a United States Marshal has no authority to fingerprint any person charged with a federal misdemeanor in Ohio. The statute states in effect that the United States Marshal may exercise the same powers which a sheriff in that state may exercise. Judge Lambros felt that this does not limit a Marshal's power but rather broadens it. The court found that the Ohio statutes permit fingerprinting of a misdemeanant. However, even if the Ohio statutes were otherwise, the authority to fingerprint exists by implication, as a matter of federal law, from the powers and duties expressly conferred upon a United States Marshal by Congress.

(2) Self-incrimination

Judge Lambros found that:

> Any evidence secured from these defendants as a result of their being fingerprinted would not be evidence of a communicative nature. Fingerprinting does not, therefore, violate any right of these defendants against self-incrimination.

(3) Unreasonable Search and Seizure

Judge Lambros cited United States v. Richardson, ____F. 2d _____ (6th Cir. 1968), and stated that:

> It is questionable whether in this judicial Circuit fingerprinting can constitute a search and seizure under any circumstances.

The court noted that fingerprinting is normally a procedure for purposes of identification, and not a search to effectuate an evidentiary purpose. The court held that reasonable police procedures, performed to effectuate a governmental interest other than the discovery of incriminating evidence, do not constitute a search within the meaning of the Fourth Amendment.

(4) Right of Privacy

Defendants argued that men of their reputation and standing in the community were not likely to have criminal records nor were they likely to flee the jurisdiction. Defendants stated that their being summoned rather than arrested by the Government impliedly recognized the above. The defendants reasoned, therefore, that there was neither justification nor administrative necessity for fingerprinting in their case and, hence, that such procedure would constitute an unwarranted invasion of privacy, citing Griswold v. Connecticut, 381 U. S. 479 (1965). The court found justification for the procedure because, while it is unlikely, it is not impossible that defendants have committed other offenses or will flee the jurisdiction. As to being summoned and not arrested Judge Lambros stated:

> If the court were to distinguish between arrested persons and summoned persons, permitting the fingerprinting only of those arrested, the government would be inclined to arrest more persons in order to be certain of obtaining fingerprints as insurance against the possibility of flight.

Regarding Griswold, Judge Lambros stated that the right of marital privacy contemplated there bears little resemblance to the pursuance of a reasonable and legitimate governmental interest such as fingerprinting persons accused of criminal acts.

The defendants' motion was denied and they were ordered to present themselves to the Marshal by April 15 to be fingerprinted and photographed.

Staff: Carl L. Steinhouse, Robert M. Dixon, Rodman M. Douglas and Charles E. Hamilton, III (Antitrust Division)

LABOR UNION FOUND TO HAVE VIOLATED SECTIONS 1 AND 2 OF THE SHERMAN ACT.

United States v. Sabrett Food Products Corp., et al. (62 CIV 2031; April 5, 1968; D. J. 60-50-82)

On April 5, 1968, an opinion, findings of fact and conclusions of law were entered by Judge Levet in this action, following a two-week trial in November 1967. The court found for the Government against the defendant labor union, Local 627, and the corporate defendant, Olympia Provision & Baking Co., Inc., which had defaulted at trial. Two other corporate defendants had consented to the entry of judgments against them at the opening of trial.

In summary, Judge Levet concluded that the frankfurter distributor-members of Local 627 are independent contractors; that the activities of Local 627 on behalf of these distributor-members served no legitimate labor objectives; that such activities are not exempted from the Sherman Act; that Local 627, the distributor-members, and the three frankfurter manufacturer-defendants combined and conspired to restrain and monopolize the manufacture, sale and distribution of frankfurters by means of price-fixing and boycott agreements, in violation of Sections 1 and 2 of the Sherman Act; that the Union had knowledge of, acquiesced and participated in the arrangements herein; and that the Government was entitled to equitable relief.

Judge Levet held specifically that the uniform minimum discounts and the increases of same which Local 627 obtained for its frankfurter distributor-members from the defendant-manufacturers constituted illegal price-fixing. He also held that the Union's successful efforts to enforce agreements with these manufacturers that only Union members should be allowed to distribute frankfurters constituted an illegal boycott. On the question of whether the defendants had engaged in a scheme to allocate customers, the court found for the defendants, stating that the Government had not shown "by a fair preponderance of credible evidence" that such an arrangement existed herein.

Judge Levet found, as a matter of fact and law, that the frankfurter distributors were independent businessmen, applying the common-law test of agency as to "the nature and the amount of control reserved by the person

for whom the work is done." While the court held that the fact that the distributors were independent businessmen does not, in itself, "remove the actions of the defendant-union from the protective shield of labor's antitrust exemption. . . . the activities of labor organizations on behalf of those of their members who have the status of independent contractors must be closely scrutinized before antitrust exemption may properly be allowed."

In endeavoring to reconcile "the fundamental conflict" between the underlying policies of the labor and antitrust laws, the court observed that union activities have been protected "only where union-imposed restraints upon the labor market directly yield immediate benefits to the legitimate interests of labor organizations, and where the relative impact upon the product market is indirect and consequential. . . ." However, "where union activities have been aimed directly at commercial competition (such as price-fixing or boycotts) antitrust considerations have prevailed despite the labor interests sought to be protected or advanced thereby."

Judge Levet then went on to hold that absent the justification of a legitimate labor objective (which he found did not exist herein), the Union's actities here, "which were aimed directly at commercial competition are not immune from antitrust liability."

Staff: Norman H. Seidler, Irving Kagan and Donald L. Flexner (Antitrust Division)

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CIVIL DIVISION

Assistant Attorney General Edwin L. Weisl, Jr.

SPECIAL NOTICE

PROMPT COMMUNICATION WITH THE DEPARTMENT

Prompt notification to the Department of cases filed in the district or state courts is essential. See United States Attorneys' Manual, Title III, page 6.

In a number of instances recently failure on the part of the office of the United States Attorney promptly to notify the Department or forward papers has been noted with consequent detriment to the efficient handling of the matter.

Notification to the Department by telephone or telegram is particularly important in cases involving subpoenas, mandamus, restraining orders or injunctions of any kind. However, prompt notification is important in every case and, of course, a preliminary telephone call or telegram does not eliminate the necessity for prompt forwarding of a report on actions taken and copies of briefs, memoranda, orders, motions and similar papers. Lack of copies and up-to-date information becomes particularly critical where a stay pending appeal or the need for prompt action in an appellate court may be involved. It is obviously most difficult to make an informed judgment as to what course of action should be followed if the Department lacks essential papers to show the positions already argued or decisions made in the district courts.

In addition, your attention is directed to the provision (United States Attorneys' Manual, Title III, page 6) that wherever possible instruments to be filed on behalf of the Government be submitted to the Department before filing the originals. This is particularly important where drafts have been furnished by the agency directly to the United States Attorney rather than being forwarded in the normal manner through the Department.

COURT OF APPEALS

ADMIRALTY

UNSAFE SYSTEM FOR LOADING VESSEL, WHEREBY ONE HALF OF GANG WORKS WHILE OTHER HALF RESTS, RENDERS SHIPOWNER LIABLE TO INJURED LONGSHOREMAN FOR UNSEAWORTHINESS.

Walter Adams v. United States and California Stevedore and Ballast Co. (C.A. 9, No. 21, 818; April 8, 1968; D.J. 61-11-1080)

Plaintiff longshoreman was a member of an eight man gang loading cargo into a vessel owned by the United States. In accordance with the prevailing stevedoring practice at that port, four of the longshoremen would do nothing while the other four worked; each hour, the two groups would switch functions. Plaintiff operated a fork-lift truck in the hold of the vessel, but because of the "four-on, four-off" system was forced to assist manually in the removal and stowage of cargo resting on pallets fork-lifted to the height of previously-stowed cargo. In so assisting, he fell from a raised loaded pallet which he was walking upon in order to reach the cargo table.

The injured longshoreman sued the United States on the theory that the vessel was unseaworthy. The United States, in turn, impleaded the longshoreman's employer, based on the stevedore's warranty of workmanlike service. The district court concluded that the sole cause of the accident was the plaintiff's own action in engaging in the "four-on, four-off"system and in leaving his truck, and denied recovery. On the longshoreman's appeal, the Ninth Circuit adopted the conclusions of the district court that the cause of the accident was the use of the "four-on, four-off" system. However, the Court of Appeals held that instead of precluding recovery, the district court's conclusion concerning causation demonstrated that there was insufficient manpower to perform the work and thus an unsafe method of work. According to the Court, this constituted "a typical case of unseaworthiness." The Court further held that there was no duty on the plaintiff's part to refrain from participating in the customary albeit unsafe, practice. The judgment was reversed and the matter remanded for trial of the damage issue and the issue of recovery over by the United States against the stevedore.

Staff: Gerald A. Falbo (Civil Division)

COURT MARTIAL CONVICTIONS

CIVILIAN COURTS HAVE NO JURISDICTION TO ENTERTAIN SUITS TO DECLARE COURT MARTIAL CONVICTIONS INVALID.

Edward R. Davies v. Clark M. Clifford (C.A. 1, No. 7058; April 25, 1968; D.J. 145-15-110)

In 1952, a general court martial convicted plaintiff of arson. After the Court of Military Appeals denied his petition for review, he received a Bad Conduct discharge and served the term of confinement imposed. The Army Board for the Correction of Military Records subsequently changed the character of his discharge to Honorable. Thereafter, in 1962, plaintiff sought

unsuccessfully to have the Court of Military Appeals vacate his conviction. He then brought this action in the district court in 1966, seeking a declaratory judgment that his court-martial conviction was invalid. The district court dismissed the complaint for lack of jurisdiction.

On appeal, plaintiff relied on Ashe v. McNamara, 355 F. 2d 277 (C. A. 1), in which the Court had held that a district court had jurisdiction to review the refusal of the Secretary to change the character of a discharge received as a result of a court-martial. Although we asked the First Circuit to reexamine that decision, we pointed out that plaintiff had already received the administrative relief (change in character of discharge) that the court had ruled the Ashe plaintiff was entitled to, and argued that the civilian courts lacked jurisdiction to review the court-martial conviction itself.

The First Circuit agreed that plaintiff had received all the relief authorized by Ashe, and then accepted both of our jurisdictional arguments: first, that the judgment of the Court of Military Appeals cannot be reviewed by the civilian courts except on habeas corpus and second, that a collateral attack on a court-martial conviction, where the sentence has been served and no legal disabilities result therefrom, must just as in the case of an ordinary criminal conviction, fail for mootness. The First Circuit expressly refused to accept the "implication" in Gallager v. Quinn, 363 F. 2d 301 (C. A. D. C.), and Augenblick v. United States, 377 F 2d 586 (Ct. Cl.), certiorari granted, April 29, 1968, that jurisdiction exists to review action of the Court of Military Appeals other than by habeas corpus.

Staff: Alan S. Rosenthal and Michael C. Farrar (Civil Division)

FEDERAL TORT CLAIMS ACT

LOSS OF PROPERTY LEFT IN UNATTENDED CLOAKROOM HELD NONACTIONABLE UNDER TORT CLAIMS ACT AS THERE WAS NO EMPLOYEE WHOSE CONDUCT CONSTITUTED A TORTIOUS ACT OR OMISSION.

Walter Joeger v. United States (C. A. D. C., No. 21, 214; April 16, 1968; D. J. 157-16-2144)

Plaintiff, while visiting an Officer's Open Mess, left his coat and gloves in an unattended cloakroom. When he returned for these items, they were missing. Plaintiff commenced suit under the Tort Claims Act to recover their value of $142.00. The district court dismissed the suit and the Court of Appeals for the District of Columbia Circuit affirmed.

The Court observed that by the Tort Claims Act the United States

consented to suit solely for an act or omission of an employee that constituted a tortious breach of duty the employee owed the plaintiff. In this case, however, the Court found that the facts alleged, at the most, showed no more than a breach of contractual duty by the Officer's Open Mess. Since there was no employee of the United States that committed a tort against plaintiff by his act or omission, the suit could not be maintained.

Staff: United States Attorney David G. Bress;
Assistant United States Attorney Lawrence E. Shinnick (D. D. C.)

GOVERNMENT EMPLOYEES

LIBEL SUIT BASED UPON INTRA-OFFICE MEMORANDUM FROM EMPLOYEES TO THEIR SUPERIORS, COMPLAINING OF CONDUCT OF FELLOW EMPLOYEE, HELD PROPERLY DISMISSED UNDER RULE OF BARR v. MATTEO.

Doris A. West v. Elizabeth R. Garrett, et al. (C. A. 5, No. 24, 431; April 11, 1968; D. J. 145-4-1532)

The Fifth Circuit affirmed the dismissal of a libel suit brought by an employee at the United States Army Missile Command, Redstone Arsenal, Huntsville, Alabama, against 11 co-workers. The suit was based upon an intra-office memoranda from the defendants to persons in their supervisory chain, complaining that the plaintiff slammed desk drawers, spoke loudly, was insubordinate and otherwise disrupted the office. The Fifth Circuit held that, under Barr v. Matteo, 360 U.S. 564, such an internal complaint was privileged, even if the defendants had not complied with the technical procedures set forth in Army regulations for filing such a complaint.

Staff: Walter H. Fleischer (Civil Division)

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CIVIL RIGHTS DIVISION

Assistant Attorney General Stephen J. Pollak

DISTRICT COURT

PUBLIC ACCOMMODATIONS

UNITED STATES BROUGHT SUIT UNDER TITLE II OF CIVIL RIGHTS ACT OF 1964, 42 U.S.C. 2000a ET SEQ., TO RESTRAIN DEFENDANT IN HIS ADMITTED PRACTICE OF REFUSING SERVICE TO NEGRO PATRONS AT HIS NEW LONDON, NORTH CAROLINA, ESTABLISHMENT.

United States v. Glenn Walter Fraley d/b/a Fraley's Tavern (M.D. N.C., No. C-56-S-67; D.J. 167-54M-39).

Fraley's Tavern is a rural restaurant and tavern. It serves sandwiches and pizza at lunch and full meals at dinner six days per week. The premises contain a tap room, a kitchen and a large dining room which includes a dance floor. Local musicians play for dancing on weekends.

The establishment enjoys a thriving beer sales business, and sells beer for on-premises or off-premises consumption. The defendant relied on this fact for his defense that he was not "principally engaged in selling food for consumption on the premises," and was therefore exempt from the Act's coverage.

The Court rejected that argument and ruled that the establishment is covered, although it found as a fact that only ten per cent of Fraley's gross receipts is derived from food sales. The court distinguished Cuevas v. Sdrales, 344 F. 2d 1019 (10 Cir., 1965), which exempted a bar from coverage, on grounds that notwithstanding relatively large beer sales receipts, Fraley's offers the public substantial food service. It ruled that Fraley's is a "restaurant" within the meaning of the Act because it holds itself out to the public as an eating establishment and has all the characteristics of a restaurant. Accordingly, the defendant was permanently enjoined from refusing service to Negro patrons.

Staff: Patrick Hardin and Monica Gallagher (Civil Rights Division)

* * *

CRIMINAL DIVISION

Assistant Attorney General Fred M. Vinson, Jr.

SPECIAL NOTICES

BAIL JUMPING

United States v. Andrews (N.D. Ga., No. 25330, January 23, 1968, D.J. 26-19-476). Previously Reported in Vol. 16. No. 7, p. 231, March 29, 1968.

This is to correct a possibly erroneous impression in the digest of this case in the above noted volume of the Bulletin. The Andrews case holds only that a bail jumping prosecution under 18 U.S.C. 3150 does not lie when a defendant is released after final sentence for several days in order to clear up his affairs before surrendering and absconds during that period. The case and the statute are both clear that a prosecution lies for bail jumping prior to trial, between trial and sentencing, and while released on bond pending appeal. The earlier reference to this case might give the impression that Andrews held that there could be a §3150 prosecution only in cases of bail jumping during pre-trial release. The actual scope of Andrews is much narrower, as indicated above, and the Department feels that even in such a narrow case the holding is erroneous and contrary to the spirit of the Bail Reform Act.

CRIMINAL PROSECUTIONS

UNITED STATES ATTORNEYS NEED NOT NOTIFY DEPARTMENT OF AGRICULTURE OF DECLINATION OF PROSECUTION IN MINOR CRIMINAL CASES IN WHICH AGRICULTURE DEPARTMENT HAS RECOMMENDED AGAINST PROSECUTION.

Recently, in the interests of greater efficiency and economy, the Department of Agriculture, pursuant to the suggestion of the Criminal Division, agreed to refer all cases involving criminal violations of Agricultural statutes (other than those containing unusual or important questions of law or policy) directly to United States Attorneys. Among the cases sent to the United States Attorneys under the new procedure will be those involving offenses as to which the Department of Agriculture believes it has no "screening" authority, i.e., to close without taking criminal prosecutive action, but as to which it believes prosecution is not warranted. When a United States Attorney, after reviewing such a case, concludes that prosecution is not warranted, he may close his file without notifying the Department of Agriculture. That Department has been informed that, regarding minor cases in which it recommends against prosecution, unless it hears to the contrary

from a United States Attorney within 90 days from the date of its referral letter, it may assume that the United States Attorney has agreed with its recommendation and declined prosecution.

ESCAPE

REQUIREMENTS FOR PROOF OF LAWFUL COMMITMENT OF FEDERAL PRISONERS IN ESCAPE PROSECUTIONS.

The United States District Court for the Northern District of Georgia has recently ordered directed verdicts of acquittal in a series of prosecutions for attempted escape. United States v. Darl Dee Parker, N. D. Ga., December 7, 1967; United States v. Donald Kusmuth Hess, N. D. Ga., December 7, 1967; and United States v. Fred Joseph Harmon, N. D. Ga., February 21, 1968. These directed verdicts were entered because the Government, in the court's opinion, failed to prove lawful commitment of the defendants.

In these cases the Government attempted to prove legal custody by testimony of the records officer of the penitentiary and by the introduction into evidence of certified copies of the commitment and judgment contained in the prison data records. The court ruled that in order to prove legal confinement the Government must produce exemplified copies of a prisoner's record of conviction from the court in which he was convicted.

While we are not suggesting that obtaining exemplified copies of a prisoner's conviction from the sentencing court will become a prerequisite to successful escape prosecutions in all districts, we think that you should be aware of the possibility.

* * *

EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

Assistant to the Deputy Attorney General John W. Kern, III

APPOINTMENTS

Arizona - RUBIN SALTER, JR.; University of Arizona College of Law, LL. B., and formerly a Deputy County Attorney.

California, Eastern - JAMES H. DAFFER; University of California Law School, LL. B., and formerly in private practice.

Connecticut - PAUL S. SHERBACOW; University of Connecticut Law School, LL. B., and formerly with Legal Aid Agency for D. C.

District of Columbia - THOMAS C. GREEN; LL. B., Yale University.

Missouri, Western - VERNON A. POSCHEL; St. Louis Law School, LL. B., and formerly Assistant, U. S. Air Force Judge Advocate.

New York, Southern - WILLIAM J. GILBRETH; Harvard Law School, LL. B., and formerly in private practice.

Ohio, Southern - ALVIN JAMES MC KENNA; Notre Dame Law School, LL. B., and formerly law clerk to federal district judge.

* * *

LAND AND NATURAL RESOURCES DIVISION

Assistant Attorney General Clyde O. Martz

SUPREME COURT

PUBLIC LANDS

MINING CLAIMS; DISCOVERY; VALUABLE MINERAL DEPOSITS; MARKETABILITY TEST; PRUDENT MAN TEST; COMMON VARIETY OF STONE; EJECTMENT

United States v. Coleman (Sup. Ct. No. 630, decided April 22, 1968 D. J. 90-1-10-579)

The Supreme Court, by a unanimous opinion, has reversed the Ninth Circuit's decision in Coleman v. United States, 363, F. 2d 190, which had reversed the decision of the Secretary of the Interior for allegedly applying improper standards in determining the validity of mining claims. By reversing the Ninth Circuit's decision, the Court has now settled an area of the mining law which has been the source of considerable litigation over the last 40 years.

This case arose as an action in ejectment commenced by the United States to oust the Colemans from 720 acres in the San Bernardino National Forest, on which they had located 18 placer mining claims. Coleman counterclaimed, seeking an order directing the United States to instruct the Secretary of the Interior to issue them a fee patent to their mining claims. The district court granted the relief sought. The Court of Appeals, in reversing the district court, denied the Government's prayer for ejectment, set aside the decision of the Secretary of the Interior rejecting Coleman's application for a patent and remanded the case to the Department of the Interior.

The Supreme Court held that the Secretary's determination that the stone located by the Colemans did not qualify as a valuable mineral deposit because it could not be marketed at a profit was proper and that the Secretary's determination does no violence to the statute. The Court stated that "the marketability test is an admirable effort to identify with greater precision and objectivity the factors relevant to a determination that a mineral deposit is 'valuable'." The Court found the marketability test to be a logical complement to the "prudent man test" which the Secretary had been following since 1894 to apply the mining laws. The Court of Appeals' objection to the marketability test as applied by the Secretary was specifically found to be unwarranted. The prudent man test and the marketability test were held not to be distinct standards but complementary to each other, in that the latter test is simply

a refinement of the former. The Court emphasized the purposes of the mining laws, saying:

> Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for any other purpose. The obvious intent was to reward and encourage the discovery of minerals that are valuable in an economic sense. Minerals which no prudent man will extract because there is no demand for them at a price higher than the costs of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent-man test, and the marketability test which the Secretary has used here merely recognizes this fact.

The Court also agreed with the Secretary and disagreed with the Court of Appeals in upholding the Secretary's ruling that immensed quantities of stone means that the stone must be considered a "common variety" and not locatable under the mining laws due to the 1955 Act, 30 U. S. C. 611. The contrary reasoning of the Court of Appeals failed to take into account the intent of Congress in passing 30 U. S. C. 611, which withdrew common varieties of stone from location under the mining laws. The legislative history and the 1955 Act were read to remove from location under the mining laws common varieties of building stone but leaving entirely effective 30 U. S. C. 161 as to building stone that has some property giving it distinct and special value. The Court then held the United States to be entitled to eject the Colemans from the land and reversed and remanded to the Court of Appeals for further proceedings to carry out its decision.

Since the Court held that the Secretary was plainly right, it did not discuss other problems concerning scope of review of decisions of the Secretary of the Interior and similar issues dealt with at length in the Court of Appeals' opinion.

Staff: Frank R. Barry (then Solicitor, Department of the Interior); Roger P. Marquis and George R. Hyde (Land and Natural Resources Division) on brief.

INDIANS

RIGHT OF RESTRICTED INDIAN TO SUE ABSENT SUIT BY UNITED STATES

Poafpybitty v. Skelly Oil Co. (Sup. Ct., No. 65, O. T. 1967; March 18, 1968, D. J. 90-2-18-82)

Poafpybitty, et. al., restricted Comanche Indians, executed an oil and gas lease on the usual Department of the Interior form to Skelly. The lease was properly approved. Producing wells were drilled on the property, and the Indians brought suit in the Oklahoma courts to recover for alleged waste committed by the lessee. Dismissal for lack of standing to bring suit was affirmed by the Supreme Court of Oklahoma. The United States Supreme Court reversed unanimously.

After briefly describing the precise nature of individual Indian allotments, the Court held that both the Indians and the United States were empowered to seek judicial relief to protect the allotment. Its discussion in this connection equated the rights of individual Indians and of tribes. Turning to the oil and gas regulations and lease terms, the Court held that such exercise of supervisory authority did not preclude suit by the Indian lessors.

Staff: Robert S. Rifkind (formerly of the office of the Solicitor General); Roger P. Marquis (Land and Natural Resources Division) on brief for the United States as amicus curiae.

COURT OF APPEALS

INDIAN LANDS

PUBLIC HIGHWAY ACT OF 1866; SECTION LINE EASEMENTS OVER INDIAN TRUST PROPERTY: ACT OF 1889, 25 STAT. 888

Bennett County, South Dakota v. United States (C. A. 8, April 24, 1968, D. J. 90-2-3-316)

Bennett County, South Dakota, attempted to construct a road along a section line over land held in trust by the United States for the benefit of certain members of the Oglala Sioux Tribe of Indians within the Pine Ridge Reservation. In doing so, it did not obtain a permit from the Secretary of the Interior (25 U. S. C 311), nor did it initiate condemnation proceedings (25 U. S. C 357). The United States District Court for the District of South Dakota permanently enjoined this construction (265 F. Supp. 249), and the County appealed, arguing that both the Public Highway Act of 1866, 43 U. S. C. 932, and Section 21 of the Act of March 2, 1889, 25 Stat. 888, authorized it to construct highways over the land in question.

In ruling on these contentions, the Eight Circuit felt it was guided by the general principle that "any intent to deprive Indian tribes of their rights in land, * * * must be clearly and unequivocally stated * * *." Thus the Court held that the 1866 grant of a "right of way for the construction of highways over public lands, not reserved for public uses," did not affect the land in

question, since the Treaty of Fort Laramie of 1851, 11 Stat. 749, II Kapp., Laws & Treaties (2d ed. 1964) 594, and subsequent Indian treaties removed the land from the public domain.

Similarly, the Court found no authorization in the Act of 1889, which, among other things, created the Pine Ridge Reservation, divided it into allotments and ceded Indian lands back to the Public Domain. The County relied on that part of Section 21 which "reserved public highways four-rods wide around every section of land allotted or opened to settlement by this Act * * *". The Court, however, viewed this phrase as "somewhat ambiguous" and then reviewed the entire Act in connection with the dominant provision of Section 21 which restored to the public domain all the lands of the Great Sioux Reservation outside the newly established reservations. Relying on the many aspects of the Act clearly designed to protect Indian rights both within and without the new reservations, the Court could not believe that Congress intended to impose a servitude by which the County could appropriate allotted reservation land without consent or the payment of compensation. Thus the reserve along section lines was held to apply only to those lands ceded back to the public domain, and the judgment enjoining the county was affirmed.

Staff: John G. Gill, Jr. (Land and Natural Resources Division)

PUBLIC LANDS

WATER RIGHTS; APPROPRIATION FOR STOCK WATERING; SCOPE OF RIGHT OF WAY EASEMENT OF 1866 ACT; MODIFICATION OF INJUNCTION AND AMENDMENT OF PLEADINGS ON REMAND; RIGHT OF UNITED STATES TO INJUNCTION AGAINST TRESPASS

Hunter v. United States (C. A. 9, 1967; 388 F. 2d 148 D. J. 90-1-12-342)

Prior to 1880, Hunter's grandfather developed certain springs which he used for watering cattle which he grazed on surrounding lands. In 1933, the lands were included within an area set aside as Death Valley National Monument. The United States sued to enjoin Hunter's grazing some 90 to 100 square miles of the monument lands without a permit from the National Park Service. The district court granted the injunction.

The Court of Appeals affirmed in part, but modified the judgment and remanded for further proceedings. Reversing the district court, it held that, under the Act of July 26, 1866, 43 U. S. C. 661, a right to use water for stock watering could be acquired by appropriation by a trespasser on the public domain under California law. However, it rejected Hunter's claim that this right carried with it an easement to graze in order to use the water. The 1866 Act included with the water right a "right of way for the construction of ditches

and canals". This, the Court said, was the limit of the easement that could be acquired for use of the water right, hence the injunction against grazing was correct. Hunter was entitled, however, to a right of way to divert the water and the Court said, the case should be remanded to permit him to amend the pleadings so as to assert a right to the easement granted by the statute, thereby settling all phases of the dispute.

Answering the claim that there was no basis for equitable intervention, the Court held unauthorized pasturing was a tort and trespass for which an injunction could be granted and that it did not matter that the act was made criminal. The Court said:

> Although the Hunters labored long and hard and went to some expense to put in and build access roads and several shacks upon the lands incidental to their livestock operations, they did so in the knowledge that they were mere squatters and that the government could and might at any time exercise its full proprietorship and dispossess them without payment of any compensation. Osborne v. United States, 145 F. 2d 892 (9th Cir. 1944).
>
> Many years ago, this court in Shannon v. United States, 160 Fed. 870, 876 (9th Cir. 1908), a case similar to the present one, answered the appellant's argument that an injunction would impose a "grievous burden" upon him with this quotation from Camfield v. United States, 167 U. S. 518, 525 (1896): "the inconvenience, or even damage, to the individual proprietor does not authorize an act which is in its nature a purpresture of government lands."

Staff: Roger P. Marquis (Land and Natural Resources Division)

PUBLIC LANDS

HOMESTEAD; RELIANCE UPON LAND OFFICE ADVICE; ESTOPPEL

Nicholas v. Secretary of the Interior (C. A. 9, 1967; 385 F. 2d 177, D. J. 90-1-4-117)

Nicholas secured proper allowance of a homestead entry in Alaska. He filed proof in 1961, stating that he cultivated three acres in 1957, ten acres in 1958 and seven acres in 1961, none of which was harvested. He claimed to have spent $7, 500 on materials and improvements on the homestead. His proof was rejected and his entry canceled, on the ground that he had not met the cultivation requirements of the homestead laws in the third and fourth years

(1959 and 1960). This rejection was affirmed through the administrative process, and the district court granted summary judgment holding that the administrative decision was rational and the findings were supported by substantial evidence. It ordered that, as the administrative decision had indicated, the plaintiff could apply for five acres as a homesite under another statute.

The Court of Appeals affirmed. After quoting the statute and regulations, it held that the record was conclusive that the requisite cultivation was not shown. Nicholas had claimed that he had gone to the Land Office at Anchorage and had been advised by a clerk at the desk that what he proposed would be sufficient to satisfy the statute. The Court of Appeals noted that while, in effect, admitting lack of cultivation, Nicholas "seeks to excuse such failure on the claimed grounds of estoppel against the appellees; relaxing by the Secretary of the provisions of the applicable statute in other homestead cases; failure to interpret the provisions of § 164 liberally in favor of the homesteader; and that the District Court erred in failing to hold that the decision of the Secretary was arbitrary and capricious." The Court said: "We have carefully reviewed the foregoing and other contentions urged by appellant. In our view none has sufficient merit to justify a reversal."

Staff: Roger P. Marquis (Land and Natural Resources Division)

ARIZONA SUPREME COURT

PUBLIC LANDS

MINING CLAIMS; ADEQUACY OF MINING LAW NOTICE AS AGAINST DUE PROCESS CLAIM; CONFLICTING PLACER AND LODE CLAIM; POSSESSORY RIGHTS; RELATIVE JURISDICTION OF STATE COURTS AND INTERIOR DEPARTMENT

Bowen v. Chemi-Cote Perlite Corp. (S. Ct. Ariz., 432 P. 2d 435, reversing 5 Ariz. App.; 423 P. 2d 104, D. J. 90-1-4-154)

Two 20-acre lode claims to perlite were located in 1944 to which Chemi-Cote is the successor in interest. In 1950 and 1954, two 160-acre placer claims for perlite, including the same land, were located by Bowen's predecessors. Bowen sought a patent from the Department of the Interior. Notice by posting, publication, etc., as required by the mining laws, was given, but Chemi-Cote did not file a protest within the 60 days allowed by the mining laws. It did later protest patenting to Bowen. This protest was dismissed because it came too late.

Chemi-Cote sued Bowen to quiet title to its claim in the Arizona Superior Court. The trial court held for Chemi-Cote, and the Court of Appeals affirmed.

It held that the district court had jurisdiction over the possessory action and, specifically rejecting the Interior decision, it held that under 30 U. S. C. 37 the lode claim was not adverse to the placer claim and, hence, it did not have to be asserted in the administrative proceedings. It also indicated that the notice provided by the mining laws did not satisfy due process. Finally, it held that the deposit here should be located as a lode claim.

Upon rehearing, the Supreme Court of Arizona reversed, following closely the argument advanced by the United States in a brief amicus curiae. It dealt first with the Court of Appeals' holding that a perfected mining claim is property which may be divested only by procedure which accords with due process. The Supreme Court stated:

> Individual rights in public mineral lands can be acquired and held, and an absolute title obtained through the land office, only upon the terms and conditions prescribed by the mining laws of Congress, Lily Mining Co. v. Kellogg, 27 Utah 282, 74 P. 518 (1903); see also, Old Dominion etc. Smelting Co. v. Haverly, II Ariz. 241 90 P. 333 (1907).

It held that:

> Congress has not given the Interior Department jurisdiction to resolve disputes as to the right of possession. When a patent to mineral lands is applied for, however, the jurisdiction of the Department becomes exclusive, and can be stayed only by the filing of an adverse claim as provided by section 30.

After discussing the statutes and several decisions, it concluded:

> Until such an adverse claim is filed, the jurisdiction of the Land Department is exclusive, and upon failure to file such a claim within the required time, the state courts are without jurisdiction to hear matters which should have been so raised. If Chemi-Cote's claim in the instant case is "adverse" to Bowen's patent application, we can see no reason to except it from these provisions.

It then held that an exception to the requirement of asserting an adverse claim when a placer claim is filed upon a tract of land upon which there is a known lode claim for some other mineral does not apply here when both claims involve the same mineral. The Court concluded that, by failure to

assert a timely adverse claim, Chemi-Cote had lost its claim, answering the due process argument by saying:

> Whatever property rights Chemi-Cote acquired in the mining claims involved in this case were not lost because of a non-reviewable decision of an administrative official, but because of its failure to comply with the applicable statutory requirements regulating distribution of the public domain. No allegation is made by Chemi-Cote that Bowen did not satisfy the statutory requirements of notice.

Staff: For the United States, amicus curiae Roger P. Marquis (Land and Natural Resources Division)

DISTRICT COURTS

PUBLIC LANDS

CANCELLATION OF MINERAL PATENTS FOR FRAUD OR MISTAKE; CANCELLATION OF ALLEGEDLY BONA FIDE MORTGAGE BY PATENTEE FOR USURY.

United States v. Desert Gold Mining Co. (D. Ariz., No. 4883-Phx., D. J. 90-1-18-605)

In 1961, the Bureau of Land Management, on behalf of the United States, issued eight patents covering 8,200 acres of public land to Desert Gold Mining Co. and others, pursuant to 30 U. S. C. 21 et seq. The patents issued upon asserted proof that gold had been discovered on the land. After the patents issued, Desert Gold executed a note and mortgage in favor of Marlin K. Edwards in the face amount of $100,000, with interest at 8% per annum.

In 1963, BLM received applications for patents to other lands by an individual who was an officer and director of Desert Gold. The applications by that individual and others for patents to the other locations were based upon assertions of gold discoveries which, to the surprise of personnel of BLM, assayed very high. BLM conducted sampling through a private contractor and the contractor's suspicions were aroused that persons were tampering with its equipment. The FBI undertook surveillance of the sampling area and apprehended one Dale Moran in the suspected act of "salting" samples. He was charged with the commission of a felony but his plea to a lesser offense, including an attempt to defraud the United States, was accepted.

Because of Dale Moran's activity in connection with the obtaining of patents to lands for Desert Gold, and reexamination of the circumstances under which those patents issued, upon the request of BLM suit was instituted

against Desert Gold and others to cancel the patents and to quiet title to the 8,200 acres in the United States. Edwards, the apparent bona fide mortgagee, was made a party. He obtained partial summary judgment dismissing the action against him on the grounds that he was in fact a bona fide purchaser for value and even if the patents had been procured through fraud or mistake, he was entitled to the protection accorded a bona fide purchaser.

After an extensive resampling of the lands, the case finally came to trial in January 1968, and on January 16, judgment was entered cancelling the patents on the ground that they were issued by mistake and quieting title to the lands in the United States as against Desert Gold. On January 17, 1968, the United States moved the court to reconsider and vacate the partial summary judgment previously entered in favor of Edwards on the grounds that it was improvidently entered, was not final, and was not supported by the facts or the law. After hearings on the motion, the court, on April 4, 1968, filed an opinion and final judgment holding that the mortgage had exceeded the legal rate allowed by Arizona law and was usurious, and for that reason Edwards was not entitled to the equitable protection ordinarily accorded bona fide purchasers. The court found that Edwards had no actual notice of the asserted fraud or mistake but that while 8% per annum is the legal rate (except in the case of corporations with an appropriate resolution), he in fact withheld the sum of $10,000 as a "service charge" which, in these circumstances, was considered additional compensation for the loan. A brokerage commission of $5,000 also was paid by Desert Gold and, since it was obligated to repay the sum of $100,000, with 8% interest on that sum, the legal rate of 8% per annum obviously had been exceeded.

Staff: Assistant United States Attorney Richard S. Allemann (D. Ariz.); Herbert Pittle (Land and Natural Resources Division)

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TAX DIVISION

Assistant Attorney General Mitchell Rogovin

SUPREME COURT - CRIMINAL CASE

MIRANDA WARNINGS MUST BE GIVEN TO ALL PERSONS IN CUSTODY

Robert T. Mathis, Sr. v. United States (Sup. Ct. #726; May 6, 1968; D. J. 5-17M-1326). A jury convicted petitioner on two counts of filing false claims for income tax refunds in violation of 18 U.S.C. 287. Part of the evidence used to convict him consisted of statements he made to an internal revenue agent while petitioner was in a Florida jail serving a state sentence. The agent did not warn him that he had a right to remain silent, that any evidence he gave might be used against him, that he had a right to counsel and that if he was unable to afford counsel one would be appointed for him. On appeal petitioner urged that his right to such a warning, as defined in Miranda v. Arizona, 384 U.S. 456, had been violated, since he was in custody at the time of the interview. The Supreme Court, in a 5-3 decision, reversed the conviction on this ground.

The Court rejected the Government's arguments that (1) the questions were asked as a part of a routine tax investigation with no criminal prosecution likely at the time, and (2) there was no relationship between the custody and the interrogation as in Miranda, petitioner being incarcerated for a wholly separate offense. The Court held that "These differences are too minor and shadowy to justify a departure from the" Miranda rule relating to warning a person who is in custody or otherwise deprived of his freedom in a significant way.

It should be noted that this decision has no application to the usual income tax investigation, whether conducted by a revenue agent or a special agent or both, but applies only to the highly unusual situation where the taxpayer is in custody at the time of the interrogation.

Staff: Daniel M. Friedman and Joseph J. Connally (Solicitor General's Office); Joseph M. Howard and Richard B. Buhrman (Tax Division)

DISTRICT COURT

SUMMONS ENFORCEMENT

COURT WILL NOT ALLOW ITS PROCESSES TO BE ABUSED IN ENFORCING ADMINISTRATIVE SUMMONSES.

United States and Internal Revenue Agent Linda C. Pugh v. James D. Nunnally (W.D. Tenn., No 67-288-Civil, February 16, 1968; D.J. 5-72-386) (68-1 U.S.T.C., par. 9201)

The assigned Revenue Agent in this case had had difficulties determining the nature and source of certain bank deposits made in the taxpayer's bank accounts. The taxpayer refused to produce his records voluntarily, but insisted that the bank records be examined. The agent issued a summons against the bank, but her examination of its books did not resolve the difficulties. The agent then issued a summons requiring the taxpayer to appear and testify and produce his records. The agent excused compliance, however, when the taxpayer's attorney advised that appearance would be fruitless. Instead, the attorney suggested that further steps at enforcement be taken. The agent did not pursue the summons, but advised the taxpayer she was recommending an assessment of further liability based on the theory that all the deposits were income. The recommendation for assessment was not accepted, however, and she was directed to issue another summons to determine the nature of the deposits. To preclude any argument about re-examination, steps were taken within the Internal Revenue Service to comply with requirements pertaining to re-examination. The taxpayer appeared but refused to testify or produce the requested records.

The United States then petitioned the District Court to enforce this summons.

The Court refused to enforce the summons on the grounds that "the conduct of the Internal Revenue Service with regard to this taxpayer for the years in question constitutes an attempt to abuse the processes of this Court." The Court cited United States v. Powell, 379 U.S. 48 [64-2 USTC, ¶ 9858] as authority that "a court may not permit its processes to be abused to enforce an administrative summons." The Court laid great stress on its finding that the agent had "assessed" the liabilities in an effort to force the taxpayer to produce his records.

The Government is considering appealing this decision.

Staff: United States Attorney Thomas L. Robinson; Assistant United States Attorney Henry L. Klein (W.D. Tenn.)

TAXPAYER NOT PERMITTED TO INTERVENE IN SUMMONS ENFORCEMENT ACTION SINCE HE DID NOT CLAIM AN INTEREST, EITHER PROPRIETARY OR OTHERWISE, IN RECORDS SOUGHT BY SUMMONS. RECORDS MAY BE OBTAINED EVEN THOUGH THEY MAY BEAR ON TAXPAYER'S CRIMINAL LIABILITY, IF THEY ALSO BEAR ON HIS CIVIL LIABILITY UNDER INVESTIGATION.

United States v. Benford (N.D. Ind., March 8, 1968, D.J. 5-26-877) (68-1 U.S.T.C. Par. 9317)

The taxpayer, Fred T. Mackey, petitioned for leave to intervene in this summons enforcement action commenced by the United States against the respondent, Fannye Jenkins Benford, pursuant to 26 U.S.C. 7602. Three summonses were issued directing the respondent, as treasurer of three corporations, to produce corporate books and records relating to the tax liabilities of Fred and Ella Mackey for the years 1961 through 1965.

The Court, in denying the petition to intervene, found that the cases relied upon by the taxpayer-intervenor were not in point. The cases allowing intervention involved summonses for records in which the intervenor had some special interest. No case cited permitted intervention solely because it was the taxpayer's liability under investigation.

The Court, in agreeing with the reasoning in Application of Cole, 342 F. 2d 5 (C.A. 2d 1965), cert. denied 381 U.S. 950, held that unless the taxpayer claims an interest in the records sought by the summons, either proprietary or otherwise, he has no right to intervene in a proceeding by the Government to obtain them in accordance with law.

The only grounds asserted by the taxpayer for intervention were: (1) that the records are sought solely for determining the taxpayer's criminal liability, or (2) that they are sought for the purpose of harassment.

The statement by the Internal Revenue agent that the records were needed to determine the taxpayer's civil liability, was accepted by the Court; and further, the Court found that the mere fact that the records may also bear on the taxpayer's criminal liability under investigation, was not a ground for refusing its production. Wild v. United States, 362 F. 2d 206 (C.A. 9th 1966); Boren v. Tucker, 239 F. 2d 767 (C.A. 9th, 1956).

The taxpayer was found not to have asserted adequate grounds for intervention under Rule 24(a), Federal Rules of Civil Procedure.

A notice of appeal has been filed by the taxpayer.

Staff: United States Attorney Alfred W. Moellering; Assistant United States Attorney Alfred R. Uzis (N.D. Ind.); Earl Kaplan (Tax Division)

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